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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MILDRED XIOMARA LOPEZ-ALECIO,

Defendant and Appellant.

F068632

(Super. Ct. Nos. CRF41861 & CRF39342)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Jonathan E. Berger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In 2012, defendant Mildred Xiomara Lopez-Alecio was charged with one count of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1), and she pled guilty in exchange for probation. In 2013, defendant was charged with one count of willful injury to a cohabitant in violation of Penal Code section 273.5, subdivision (a), and a prior serious felony pursuant to the Three Strikes law (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) was alleged.

A jury convicted defendant of willful injury to a cohabitant and found the prior strike allegation true. Defendant subsequently admitted she violated probation in the 2012 case, and the trial court sentenced her to two years for willful injury to a cohabitant, doubled to four years for the strike. The trial court also sentenced her to one year in the 2012 case, for a total determinate term of five years.

On appeal, defendant argues the trial court violated her federal due process rights by failing to instruct the jury on the permissible uses of circumstantial evidence, and defense counsel rendered ineffective assistance of counsel and violated her Sixth Amendment right to counsel when he allowed the jury to learn of her prior felony conviction.

We affirm the judgment.

FACTUAL SUMMARY

Defendant and victim Carlos Adrian Batista Rodriguez (Rodriguez) had been living together for approximately six years. On August 5, 2013, they had an argument over the use of their truck. Rodriguez needed to go to work and he left in the truck with his two children, Adrian and Carlos, Jr. (Carlos). After defendant started calling Rodriguez on his cell phone, he returned to their apartment and saw several plastic bags on the landing area in front of the apartment. He looked in the bags and saw they contained his clothes and his children's clothes. Rodriguez and the children went inside, and defendant yelled at him that she wanted him and his children out of the apartment.

Defendant then hit him 15 times on the sides of his face, pushed him, and hit him twice in the face with a metal coat hanger. The blows from the hanger broke one of his teeth and bloodied his lips.

Rodriguez went next door and asked his neighbor, Jose Hernandez, for help. Rodriguez's lip was bleeding, he said defendant had hit him, and he wanted to use Hernandez's phone to call 911. Hernandez let Rodriguez use the phone and he also translated for Rodriguez, who spoke only limited English.

Deputy Champlin with the Tuolumne County Sheriff's Department responded to the 911 call. Rodriguez told Deputy Champlin that defendant hit him 15 times on the sides of his face and then hit him twice in the facial area with a metal hanger. Rodriguez stated he had been unable to calm defendant down, and the blows split his lip and broke his tooth. Rodriguez also stated that defendant had previously hit him, but he was afraid to call law enforcement due to issues with the status of his documentation and defendant's threats to report him and have his children taken away if he called the police. Deputy Champlin also interviewed Adrian, who stated defendant started to yell and hit his father as soon as they walked in the apartment. Adrian saw defendant hit his father with her hands and then with the metal hanger, and he also saw blood on his father's mouth.

At trial, Rodriguez testified that he and defendant were in their bedroom. She hit him 15 times around the face with her arm, but the blows were not hard, and she pushed him. Rodriguez stated he was on the telephone with his boss and his head was down when he felt the blow from the metal hanger. Rodriguez testified that defendant had her back to him and when she turned around with the metal hanger in her hand, she accidentally hit him twice with it. Adrian and Carlos testified they did not see or hear anything because they were watching television. Carlos stated he was in the living room watching television, and his father and defendant were in another room.

Jose Carrion Sotelo was called to testify about a prior incident of domestic violence that occurred in August 2012. At the time, he and defendant worked at the same restaurant and had been in a romantic relationship. Defendant called the police from the restaurant and reported that Sotelo wanted to beat her up, which he denied. A sheriff's deputy went to the restaurant, spoke with defendant and Sotelo, and determined no crime had been committed. Shortly after the deputy left, defendant hit Sotelo in the head with a beer bottle, splitting his head open. Defendant subsequently pled guilty to assault with a deadly weapon.

DICUSSION

I. Failure to Instruct Jury on Circumstantial Evidence

The trial court determined that the prosecution was not relying on circumstantial evidence to prove its case and, with the parties' agreement, withdrew CALCRIM Nos. 223, 224, and 225, relating to circumstantial evidence. Defendant contends that because the jury had to find she acted willfully, the trial court had a sua sponte duty to give CALCRIM No. 225, Circumstantial Evidence: Intent or Mental State, and it erred in failing to do so.[1] We do not agree.

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[1] CALCRIM No. 225 provides:

"The People must prove not only that the defendant did the act[s] charged, but also that (he/she) acted with a particular (intent/ [and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/ [and/or] mental state) required.

"A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence.

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/ [and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/ [and/or] mental state) was not proved by the circumstantial evidence. However, when

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citations.]" (*People v. Diaz* (2015) 60 Cal.4th 1176, 1189.) It is not necessary for the trial court to instruct on the use of circumstantial evidence "unless the prosecution substantially relies on circumstantial evidence to prove its case." (*People v. Anderson* (2001) 25 Cal.4th 543, 582.) "[W]here circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction may confuse and mislead, and thus should not be given." (*Ibid.*)

As a preliminary matter, Penal Code section 273.5 provides that it is a felony to "willfully inflict[] corporal injury resulting in a traumatic condition upon" a cohabitant. (*Id.*, subds. (a), (b)(2).) The infliction of corporal injury need only be willful and Penal Code section 273.5 is, therefore, a general intent crime. (*People v. Burton* (2015) 243 Cal.App.4th 129, 134, fn. 8.) Defendant does not contend otherwise. CALCRIM No. 225, however, "refers to a special mental state, analogous to a specific intent," and defendant offers no explanation why this instruction is appropriate for a general intent crime. (*People v. Swanson* (1983) 142 Cal.App.3d 104, 110 [addressing inapplicability of CALJIC No. 2.02, which corresponds with CALCRIM No. 225, to general intent crime of false imprisonment].)

Regardless, the prosecution's case did not substantially rely on circumstantial evidence. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 582.) There is no dispute that defendant hit Rodriguez with a metal hanger and injured him. At issue was whether

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considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

defendant acted willfully. The prosecution presented the testimony of Rodriguez, his sons Adrian and Carlos, the neighbor who assisted Rodriguez with his 911 call, and Deputy Champlin, along with testimonial and photographic evidence of Rodriguez's injuries. This direct evidence underpinned the prosecution's case, and it was up to the jury to evaluate the evidence, some of which was conflicting, and determine what occurred on August 5, 2013. "'There is rarely direct evidence of a defendant's intent.'" (*People v. Smith* (2005) 37 Cal.4th 733, 736.) However, the need for the jury to draw from the direct evidence presented the inference that defendant acted willfully does not transform the prosecution's case into one that substantially rested on circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–175; *People v. Downer* (1962) 57 Cal.2d 800, 813–814.) "'[T]he problem of inferring guilt from a pattern of incriminating circumstances [was] not present'" here (*People v. Wiley*, *supra*, at p. 174) and, therefore, the trial court did not err in failing to instruct sua sponte on circumstantial evidence.[2]

II. Trial Counsel's Failure to Request Bifurcation of Prior Strike Determination

Defendant also contends her trial counsel's failure to seek bifurcation of the prior strike determination constituted ineffective assistance of counsel. We find no merit to this argument.

On appeal, the defendant bears the burden of proving ineffective assistance of counsel. (*People v. Mattson* (1990) 50 Cal.3d 826, 876–877.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that [the] defendant would have obtained a more

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[2] Given this determination, we do not reach defendant's remaining arguments, which we find inapplicable.

favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687–694.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham*, *supra*, at p. 1003.) "[I]n assessing a Sixth Amendment attack on trial counsel's adequacy mounted on *direct appeal*, competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney's choice. [Citations.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260; accord, *People v. Stewart* (2004) 33 Cal.4th 425, 459.)

Trial courts have the discretion to "order that the determination of the truth of a prior conviction allegation be determined in a separate proceeding before the same jury, after the jury has returned a verdict of guilty of the charged offense." (*People v. Calderon* (1994) 9 Cal.4th 69, 75.) However, a bifurcated proceeding "is *not* required *in every instance*." (*Id.* at p. 78.) "Perhaps the most common situation in which bifurcation of the determination of the truth of a prior conviction allegation is *not* required arises when, even if bifurcation were ordered, the jury still would learn of the existence of the prior conviction before returning a verdict of guilty." (*Ibid.*) Such was the situation here.

Section 1109, subdivision (a)(1), of the Evidence Code provides, in relevant part, that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." Thus, absent a determination under Evidence Code section 352 that the "probative value [was] substantially outweighed by the probability that its admission [would] … create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" (Evid. Code, § 352), evidence of defendant's prior domestic violence conviction was admissible at trial under Evidence Code section 1109 (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232–1233 (*Brown*); *People v. Johnson* (2000) 77 Cal.App.4th 410, 416–417, 420 (*Johnson*)). This

section represents an exception to the rule that "'[e]vidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts.' [Citation.]" (*Brown*, *supra*, at p. 1232.)

It was pursuant to Evidence Code section 1109 that Jose Sotelo testified at trial that defendant split his head open with a beer bottle in 2012. The prosecution also presented two photographs of Sotelo's injuries, the minute order documenting defendant's guilty plea, and the jail booking slip for the incident. While trial counsel strenuously objected to the exhibits under Evidence Code section 352, his objections were overruled and the exhibits were admitted. (*Brown*, *supra*, 192 Cal.App.4th at p. 1232; *Johnson*, *supra*, 77 Cal.App.4th at pp. 416–417, 420.) It is clear from the record that although counsel disagreed with the law, he understood it and knew that the fact of defendant's prior conviction was going to come in under Evidence Code section 1109 through the testimony of Sotelo, absent an exclusion under Evidence Code section 352. (*Brown*, *supra*, at p. 1233; *Johnson*, *supra*, at pp. 416–417, 420.) Under these circumstances, counsel could reasonably have concluded that seeking bifurcation would have been futile or of minimal value given the jury was going to learn of the underlying conduct and, in fact, in discussing bifurcation with the trial court, counsel stated, "'They're going to hear about it anyways because of the fact that the [victim in the prior] is testifying.'" Thus, this is not a circumstance in which "the record *affirmatively* excludes a rational basis" for counsel's decision not to request bifurcation. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1260.) To the contrary, the record affirmatively includes a rational basis for counsel's choice and we reject defendant's argument that his failure to request bifurcation constituted ineffective assistance of counsel. (*People v. Calderon*, *supra*, 9 Cal.4th at p. 78.)

Moreover, there is no prejudice. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1003.) It was not disputed at trial that defendant hit Rodriguez in the mouth twice with a metal hanger and injured him. Although Rodriguez testified that upon further

reflection, he understood it was an accident, he told Deputy Champlin on the day of the incident that defendant was angry and yelling when she struck him with the hanger, and he was unable to calm her down. His son also told Deputy Champlin that defendant started yelling and hit his father almost immediately after they entered the apartment. Further, the extent of Rodriguez's injuries was consistent with intentional blows inflicted in anger. Less plausible was Rodriguez's explanation at trial that he was standing behind defendant and she injured him when she turned around with a hanger in her hand and accidentally struck him. Finally, bifurcating adjudication of the truth of the prior serious felony would not have prevented the jury from hearing about the prior incident of domestic violence because the prosecution was entitled to introduce evidence of it under Evidence Code section 1109. Thus, there is no "reasonable probability that defendant would have obtained a more favorable result" had counsel sought bifurcation. (*People v. Cunningham, supra,* at p. 1003.)

DISPOSITION

The judgment is affirmed.

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KANE, Acting P.J.

WE CONCUR:

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FRANSON, J.

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PEÑA, J.